SUPREME COURT, U. S.

279

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

MARION FRANK CRAWFORD,

RESPONDENT

v.

STATE OF NORTH CAROLINA

and

V. LEE BOUNDS, WARDEN OF CENTRAL PRISON (SUCCESSOR TO K. B. BAILEY),

PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in the case of MARION FRANK CRAWFORD v. V. LEE BOUNDS (SUCCESSOR TO K. B. BAILEY) entered on April 11, 1968.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as MARION FRANK CRAWFORD v. V. LEE BOUNDS (SUCCESSOR TO K. B. BAILEY), ... F. 2d ..... (4th Cir. 1968) (No. 10,981) and is printed as Appendix E to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code 1254 (1).

QUESTION PRESENTED

TO COMPORT WITH THE EQUAL PROTECTION OF THE LAWS MUST THE STATE FOREGO ANY CHALLENGE OF A JURY VENIREMAN FOR CAUSE WHO HAS EXPRESSED SCRUPLES AGAINST CAPITAL PUNISHMENT UNLESS THE STATE ALSO ASCERTAINS ON *VOIR DIRE* THAT THAT PROSPECTIVE JURYMAN COULD BRING IN A VERDICT OF GUILTY REGARDLESS OF PUNISHMENT IN A CASE IN WHICH THE JURY DETERMINES GUILT AND A PUNISHMENT OF DEATH OR LIFE IMPRISONMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States is invoked and was the general basis of the decision below.

STATEMENT OF THE CASE

On November 29, 1962 in Winston-Salem, North Carolina, Marion Frank Crawford was arrested and subsequently indicted by the Grand Jury of Forsyth County for the commission of two (2) capital punishment felonies, rape and murder, upon one Sandra Denise Marshall, an eight (8) year old Negro girl. At the January 1963 Term of the Superior Court of Forsyth County, Crawford was arraigned, and was subsequently tried at the February 1963 Term. The verdict was that Crawford was guilty of murder in the first degree and the jury did not recommend mercy; therefore, it was mandatory

that the death penalty be imposed under North Carolina Law. (G. S. 14-17).

Notice of appeal was given by Crawford, and the case was heard in the Supreme Court of North Carolina, and the opinion thereof is cited as STATE v. CRAWFORD, 260 N. C. 548, 133 S. E. 232, (1963).

After the Supreme Court of North Carolina had reviewed the case, and had found no error, the date of execution was set for January 10, 1964; early that morning, Crawford's attorney filed in the Eastern District of the United States Court an application for a Habeas Corpus Hearing and the Court entered an Order staying the execution of the death sentence. An amended application was filed on January 20, 1964, and same was denied by the District Court, on October 21, 1964, for failure to exhaust State remedies; however, the cause was retained.

Crawford had a plenary Post-Conviction Hearing in the State Court and a Certiorari review by the Supreme Court of North Carolina, as per N.C.G.S. 15-217 et seq., (Post-Conviction Hearing Statutes) and after all of these reviews, a final Order was entered by the District Court and filed on January 18, 1966 denying the application for a Writ of Habeas Corpus and vacating the Stay of Execution.

From the judgment entered on January 18, 1966 in the District Court denying the relief sought by Crawford, he appealed to the Circuit Court of Appeals seeking a review of the judgment, and Stay of Execution, which Stay was allowed on February 2, 1966, pending the completion of his appeal.

The District Court judgment of January 19, 1966 was reviewed on appeal in the Fourth Circuit Court of Appeals on May 3, 1966, and Case No. 10,477, was remanded to the Dis-

trict Court in a per curiam opinion filed on May 6, 1966. CRAWFORD v. NORTH CAROLINA, 360 F. 2nd. 596, (1966).

After remand the District Court entertained the new petition filed in behalf of Crawford, which was filed on May 19, 1966. The District Court ordered the Stay of Execution vacated and denied the Petition for Habeas Corpus. Crawford appealed. The United States Court of Appeals for the Fourth Circuit accepted the appeal, and entered the decision which the State of North Carolina seeks this Court to review by virtue of this petition.

REASONS FOR GRANTING THE WRIT

(1) The equal protection of the laws basis for the Crawford case collides violently with the due process basis adopted in *Witherspoon.*

(2) The holding of Crawford, in effect, forces North Carolina to adopt a two-trial system in capital cases.

(3) Contrary to *Witherspoon*, the Circuit Court of Appeals ordered the conviction as well as the punishment overturned when this Court only vitiated the punishment on the ground of improper jury selection.

This Writ should be granted to clarify the clear distinction between the decisional bases of *Witherspoon v. Illinois* (No. 1015 October Term, United States Supreme Court, 1967) and *Crawford v. Bounds* (10,981 4th Cir. decided April 1, 1968). Both cases were decided on the general basis of the unconstitutionality of the manner in which the juries were selected. In *Crawford*, however, a new constitutional edifice is erected against the State, and it is based on the doubtful foundation of equal protection of the laws. This Court in *Witherspoon*,

however, based its decision on violation of due process. The distinction may seem small, but the result for the instant case and the future of criminal procedure in the Fourth Circuit is large. This Court thought it only necessary to decide that the exclusion of veniremen from the jury to decide the issue of guilt and punishment because these particular veniremen had scruples against capital punishment was a violation of due process. The Fourth Circuit Court of Appeals, however, based its decision, in the majority opinion, on the equal protection of the laws, and in doing so, erected a constitutional doctrine so rigid that it may force the State of North Carolina to adopt a two-trial system in order to enforce its policy of capital punishment—a policy that has worked well in our State in executing only criminals who have been convicted of the most heinous crimes. The majority opinion in *Crawford*, writes its view of what North Carolina must do as follows on page 29:

> "Under our view of how the existing North Carolina procedure and practice must be accommodated to a defendant's constitutional rights, prosecutors in that state must run the risk that a person who has conscientious objections to capital punishment will either successfully persuade his fellow-jurors that the death penalty should not be imposed on the defendant whose case is being tried or that he will cause the jury to disagree because of disagreement on the issue of punishment, although agreeing on the defendant's guilt. This is so because North Carolina's resolution of the conflict of the interest of the prosecutor in obtaining a jury which is free to sentence the defendant in any manner which the statute allows and petitioner's rights to trial by a representative jury by making the state's interest wholly paramount cannot stand under the equal protection clause."

This Court, conversely, held that the method of choosing jurors by the State of Illinois, similar to that of North Caro-

lina, was only a violation of due process, and that the conviction would not be affected. It is most doubtful that the method used by North Carolina in this case is sufficient to meet the test of *Witherspoon*, although it was adopted on what was thought to be unassailable law, *United States v. Puff*, 211 F. 2d 171 (2d Cir. (1954)) and numerous cases in our own jurisdiction and others, *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967) and Annot. 48 A.L.R. 2d 560. The difficulty arises in meeting the test of *Crawford* in addition to *Witherspoon*, for it was said in *Witherspoon* in explanation of the text on the question of what may or may not be done in selecting a juror in footnote 21:

> ". . . The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

Compare this with the language of the majority opinion of the Fourth Circuit in *Crawford*:

> "Where we depart from prior decisions is that we do hold that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws."

This is a theory of "fair representation" and "equal protection of the laws" greatly differing from the narrow basis of *Witherspoon* and is based on a much broader legal foundation, extending the doctrine of equal protection of the laws, fair representation of the community and standing to sue beyond what they had previously been on the slim constitutional authority of *Smith v. Texas*, 311 U. S. 128, 85 L. ed. 84 (1940) in which Negroes were excluded from grand jury service, and it was held a violation of equal protection of the laws.

The holding in the *Smith* case was used to bolster three other cases that were not, as the Fourth Circuit admitted, strictly constitutional cases. These cases are *Glasser v. United States*, 315 U.S. 60 (1940); *Ballard v. United States*, 329 U.S. 187 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

Glasser concerned the exclusion of women from the grand jury; *Ballard* also dealt with exclusion of women from the grand jury and also from the petit jury; *Thiel* dealt with the exclusion of wage earners from the jury. From these cases, the Fourth Circuit concluded at page 24:

> "North Carolina's practice of excluding persons from the jury selected to determine an accused's guilt or innocence, merely because they have some sentiment or reservation against capital punishment, without any determination that their beliefs would affect their ability to decide the issue of culpability, cannot stand under these Supreme Court decisions condemning systematic exclusion."

One can agree that there should not be exclusion of a certain sex or a social class from juries without accepting the much further extension promulgated here that exclusion of prospective jurors who have scruples against capital punishment is a violation of equal protection of the laws because there was not

a jury representative of the community—a position much broader than that promulgated in *Witherspoon*, which only held the punishment was unconstitutional and set no such broad constitutional precedent as this.

In all candor to the Court, it is readily admitted that there were several concurring opinions in *Crawford*, and it must be said that some of the concurring judges did not wish to adopt the sweeping constitutional decision promulgated in the majority. Judge Haynsworth wrote at page 32:

> "Our speculation is a slender reed, indeed, to support the imposition upon the states, and United States District Courts too, of the extraordinary requirements of bifurcated trials in capital cases. Really what the majority requires is two full trials if the first results in a verdict of guilty, for the second jury can hardly decide the question of punishment without being fully informed of all the circumstances of the crime, the defendant's defenses and his mental and emotional condition, everything, in short, developed at the first trial."

Judges Sobeloff, Bryan, Boreman and Craven wrote separate opinions.

The result is a very difficult and sweeping constitutional rule that has only two of the seven judges in agreement on the rationale (Judge Butzner did not write an opinion), that differs from *Witherspoon* in sweep, rationale, constitutional bases, and result for future trials.

CONCLUSION

This case must be so carved in purport to be made to mesh with *Witherspoon*.

The case is now nearly six years old. Whether a conviction

can now be secured is doubtful if the conviction as well as the punishment are ruled infirm, but the rules promulgated in the process can be so changed that future trials will be more certain and at less expense to the State.

It is respectfully requested that this Court issue the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to the end that this case can be scrutinized by this Court and made to comport with this Court's decisions on the selection of jurors and the determination of guilt and punishment, and such other relief that the Court may think just and proper.

Respectfully submitted,

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